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## Impeachment As a Remedy

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## IMPEACHMENT AS A REMEDY

By C. S. PORRS\*

On April 1, 1926, the House of Representatives of the United States Congress, after a series of committee investigations covering a period of more than a year, and after a vigorous and very earnest debate of three days duration,<sup>1</sup> resolved by a vote of nearly five to one<sup>2</sup> to prefer impeachment charges against George W. English, United States district judge for the eastern district of Illinois. A few days later the charges were presented to the Senate, but that body, on account of the pressure of other matters, postponed the trial of the case until a special session of the Senate called to meet on November 10, 1926. In this way the ponderous machinery of impeachment was set in motion, and, but for the recent resignation of the respondent, we would have witnessed the tenth<sup>3</sup> great national trial, with the ninety-six senators sitting as judge and jury and the House of Representatives, through its board of managers, adding to its inquisitorial functions previously performed, those of prosecutor on behalf of the nation. The whole constitutes a stupendous performance of vital importance to the nation, and naturally raises questions as to the nature and effectiveness of this piece of governmental machinery taken over from the English system by our constitution makers of the post-Revo-

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<sup>1</sup> CONGRESSIONAL RECORD, March 30, March 31 and April 1, 1926, pp. 6401-6410, 6456-6472, 6521-6542, 6615-6640.

<sup>2</sup> CONGRESSIONAL RECORD, April 1, 1926, p. 6541. The vote is given as follows: Yeas 306, nays 62, "present" 3, not voting 60.

<sup>3</sup> The nine previous federal impeachment trials, with their dates and results are as follows:

Senator William Blount, 1797-1799, dismissed for want of jurisdiction, by vote of 14 to 11.

Judge John Pickering, 1803-1804, removed by vote of 19 to 7.

Judge Samuel Chase, 1804-1805, acquitted, highest adverse vote 19 guilty, 15 not guilty.

Judge James H. Peck, 1830-1831, acquitted, guilty 22, not guilty 21.

Judge West H. Humphreys, 1862, removed and disqualified by unanimous vote.

President Andrew Johnson, 1868, acquitted, guilty 35, not guilty 19.

Secretary of War, William W. Belknap, 1876, resigned before charges were voted by House. Acquitted, guilty 37, "not guilty for want of jurisdiction," 23, "not guilty," 1.

Judge Charles Swayne, 1904-1905, acquitted—highest adverse vote 35 guilty, 47 not guilty.

Judge Robert W. Archbald, 1912-1913, removed and disqualified, guilty 68, not guilty 5, absent or not voting 21.

See 3 HINDS, PRECEDENTS, Chapters LXX-LXXIX, pp. 644-980; PROCEEDINGS IN TRIAL OF JUDGE ROBERT W. ARCHBALD, 1622 *et seq.*

lutionary period. It is believed, therefore, that a brief survey of the subject will prove of interest and value to lawyers and to students of public affairs generally.

### WHO MAY BE IMPEACHED?

In taking over the impeachment machinery the fathers of 1787 were but doing what they did in constructing almost every other part of the Constitution—they adopted, with more or less change, legal principles and governmental devices with which they, as common law lawyers and former British subjects, were familiar. In the matter of impeachments, they took over the English institution, bag and baggage, with one important explicit and one equally important implicit change. The explicit change is found in the provision that “judgment in cases of impeachment shall not extend further than removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States,”<sup>4</sup> whereas under the English system there was no limit to the penalties that could be assessed by the House of Lords.<sup>5</sup> The other change, resulting by reasonable implication from the language used in our constitutions, state and national, is that only public officers are subject to impeachment in this country, whereas in England all the king’s subjects whether officers or private citizens were subject to impeachment for “high crimes and misdemeanors.”<sup>6</sup> And it should be noted that not all public officers

<sup>4</sup> Const. Art. I, Sec. 3 (7).

<sup>5</sup> The penalties assessed by the House of Lords often included fines and imprisonment and even death itself. Thus, Lord Lovat, convicted of high treason in 1747, the last person convicted on an impeachment trial in England, had this gruesome sentence passed upon him by the Lord High Steward who presided at the trial:

“That you, Simon, Lord Lovat, return to the prison of the Tower, from whence you came, from thence you must be drawn to the place of execution; when you come there you must be hanged by the neck, but not till you are dead, for you must be cut down alive, then your bowels must be taken out and burned before your face, then your head must be severed from your body, and your body divided into four quarters, and these must be at the king’s disposal. And God Almighty be merciful to your soul.” MACKAY, TRIAL OF LORD LOVAT, 274.

For political reasons the sentence was not literally carried out but the body was buried in the Tower.

<sup>6</sup> It was not at all clear from the early state constitutions and from the federal constitution that private citizens were not subject to impeachment. Thus the constitution of Virginia of 1776, provided that

“The governor, when he is out of office, and others offending against the State, either by maladministration, corruption, or other means, by which the safety of the State is endangered, shall be impeachable by the house of delegates.” 7 THORPE, CONSTITUTIONS, 3818.

The Constitution of the United States, in Art. 2, Sec. 4, provides that “the President, Vice-President, and all civil officers shall be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and

of the United States are subject to impeachment, for the Constitution by declaring that "the President, Vice-President, and all civil officers shall be removed from office on impeachment,"<sup>7</sup> clearly implies that military officers are not within the impeachable class, and in the first case of impeachment arising under the Constitution, that against Senator William Blount, it was decided that the language just quoted did not apply to members of the Senate and of the House of Representatives.<sup>8</sup> With these two important exceptions, that the penalty upon conviction is with us restricted to removal from office and disqualification for holding office, and that only civil officers of the United States may be impeached, the law of impeachment as it had existed in England was incorporated bodily into our system, and from the beginning English precedents have constantly been referred to both in matters of substantive law and in matters of procedure.<sup>9</sup>

misdemeanors," but it nowhere states that other persons are not also subject to impeachment. In the first federal impeachment, that of Senator Wm. Blount, in 1797, it was argued by James A. Bayard, of Delaware, one of the managers for the House, that all citizens were subject to impeachment. (3 HINDS, PRECEDENTS, 667.) So effective was his argument that Jefferson, who as Vice-President presided over the trial, wrote to Madison: "I think that there will not be more than two votes north of the Potomac against the universality of the impeaching power." To this Madison replied: "The universality of this power is the most extravagant novelty that has been broached." (Quoted in the Belknap trial, see CONG. REC. 44 Cong., 1 Sess., Vol. 4, pt. 7, 157.) The question did not come to a direct vote in the Blount trial, but the claim that private citizens are impeachable has not been seriously argued since that time. In *Nebraska vs. Hill*, 37 Neb., 80, 84, there is a dictum to the effect that persons who have not held office are not impeachable. For a further discussion of this point, see David Y. Thomas, "The Law of Impeachment in the United States," 2 AMER. POL. SCI. REV. 378, 385-6.

<sup>7</sup> Const., Art. II, Sec. 4.

<sup>8</sup> See Trial of William Blount, 3 HINDS, PRECEDENTS, ch. LXX, Sec. 2316, pp. 644, 669. In this case, involving the impeachment of Senator Wm. Blount, of Tennessee, on a charge of having conspired in a time of peace to organize a hostile attack on the dominions of the King of Spain in the Floridas and Louisiana, the Senate held by a vote of 14 to 11 that it did not have jurisdiction to try the case. Two grounds for this holding had been urged by counsel for respondent, one that a member of the House or Senate is not a civil officer, within the meaning of the language of the Constitution, and the other that even if Blount had been a civil officer when first impeached, he had lost that character by the fact that the Senate had expelled him. The arguments clearly show that the first contention was the one mainly relied upon, and the Senate's action has always been regarded as having established the fact that members of Congress are not impeachable.

<sup>9</sup> The faithfulness with which we copied the English procedure is illustrated in the final voting on the question of guilty. In the trial of Lord Lovat we find this account:

"Then the Lord High Steward stood up, uncovered, and, beginning with the youngest peer, said, 'Henry Arthur, Lord Herbert, of Chirbury, what says your lordship? Is Simon, Lord Lovat, guilty of the high treason whereof he stands impeached, or not guilty?' Whereupon Henry Arthur, Lord Herbert, of Chirbury, standing up in his place, uncovered, and laying his right hand on his breast, answered—Lord Herbert: Guilty, upon my honor.'

In like manner the several lords aftermentioned, being all that were

## MAY AN EX-OFFICER BE IMPEACHED?

Although this question has arisen in a number of cases and has been much discussed for a hundred and thirty years, it is still involved in some uncertainty. That there is nothing in the nature of the impeachment remedy that calls for a negative answer to the question is clearly shown by the fact that several of the early state constitutions provided that an officer might be impeached whether his term of office had expired or not,<sup>10</sup> and in at least two of them provision was made that the chief executive could not be impeached until after his retirement from office.<sup>11</sup> But it has been argued that the language of the Federal Constitution, declaring that certain officers upon conviction "shall be removed from office," and limiting the penalty upon conviction to "removal from office and disqualification to hold any office," which has been copied into most of the state constitutions since 1787, necessarily limits the power of impeachment to persons actually holding office at the time. Thus Judge Story, after quoting these clauses of the Constitution, says that "it would seem to follow that the Senate, on the conviction, were bound in all cases to enter a judgment of removal from office, though it has a discretion as to inflicting the punishment of disqualification." Continuing, he says:

If, then, there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of impeachment. . . . It might

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present, being respectively asked the same question, answered as follows." MACKEY, TRIAL OF LORD LOVAT, 278.

[Here follows a list of the lords and a record of their notes.]

In the impeachment of Judge Robert W. Archbald, in 1913, the Senate of the United States was still using practically the same ceremony in voting, as shown by the following order:

"Ordered, That upon the final vote in the pending impeachment the Secretary shall read the articles of impeachment successively, and when the reading of each article is concluded the Presiding Officer shall state the question thereon as follows:

'Senators, How say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article?'

Thereupon the roll of the Senate shall be called and each Senator as his name is called shall arise in his place and answer 'guilty' or 'not guilty'."—2 IMPEACHMENT OF ROBERT W. ARCHBALD, 1620.

<sup>10</sup> Sec. 22 of the "Plan or Frame of Government for the Commonwealth or State of Pennsylvania," adopted in 1776, provided that "every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or *after his resignation or removal* for mal-administration." 5 THORPE, CONSTITUTIONS, 3088.

The Constitution of New Jersey of 1844 declared all civil officers impeachable "during their continuance in office, and for two years thereafter." Art. V, Sec. 11. 5 THORPE, CONSTITUTIONS, p. 2607.

<sup>11</sup> For the provision of the Virginia Constitution of 1776, see note 5 *supra*. This provision was copied into the constitution of Delaware, promulgated September 21, 1776. 1 THORPE, CONSTITUTIONS, 566.

be argued with some force that it would be a vain exercise of authority to try a delinquent for an impeachable offence when the most important object for which the remedy was given was no longer necessary or attainable. And although a judgment of disqualification might still be pronounced, the language of the Constitution may create some doubt whether it can be pronounced without being coupled with removal from office.<sup>12</sup>

It will be noted that Judge Story's argument would require that the defendant be in office at the moment of final judgment by the court of impeachment, and that the resignation of the respondent or the expiration of his term of office during the course of the trial would divest the Senate of jurisdiction to pronounce judgment. Others have gone to the other extreme and have argued that the impeachability of an officer does not end with his term of office, but continues throughout his whole life. This contention was strongly urged by John Quincy Adams, when, in 1846, it was proposed, as a preliminary to impeachment, to investigate the conduct of Daniel Webster as Secretary of State under President Tyler, which office he had resigned some three years before.<sup>13</sup>

The first case in which the question arose was that of William Blount. When the case was called for trial his counsel contended that as the Senate had already expelled him, he was a private citizen and the Senate had no jurisdiction to try the impeachment charges which the House had brought against him. They admitted, however, that he could not, by resigning, divest the Senate of jurisdiction to

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<sup>12</sup> STORY ON THE CONSTITUTION, 5th ed. Sec. 803, p. 586.

<sup>13</sup> On that occasion the venerable John Quincy Adams, then a member of the House and a learned exponent of the Constitution, used the following language:

"And here I take occasion to say that I differ with the gentleman from Virginia [Mr. Bayley] and I believe other gentlemen who stated that the day of impeachment has passed under the constitution the moment the public office expires. I hold no such doctrine. I hold myself, so long as I have breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office."

At this point Mr. Bayley interrupted with the inquiry: "Is not the judgment in case of impeachment removal from office?" to which Mr. Adams replied:

"And disqualification to hold any office of honor, trust or profit under the United States forever afterward—a punishment much greater, in my opinion, than removal from office. It clings to a man so long as he lives, and if any public officer ever puts himself in a position to be tried by impeachment he would have very little of my good opinion if he did not think disqualification from holding office for life a more severe punishment than mere removal from office. I hold, therefore, that every President of the United States, every Secretary of State, every officer of the United States impeachable by the laws of the country is as liable twenty years after his office has expired as he is while he continues in office." Quoted in Belknap Trial, CONG. REC., 44 Cong. 1st Sess. Vol. 4, pt. 7, p. 151.

try him, one of them, Alexander J. Dallas, saying: "I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office."<sup>14</sup> The Senate by a vote of 14 to 11 held that it did not have jurisdiction to try Blount, but that decision was based on the ground that a senator is not a civil officer within the meaning of the impeachment clause of the Constitution, and not on the ground that he was already out of office.<sup>15</sup>

In 1862, the House impeached and the Senate tried, convicted, removed and disqualified, Judge West H. Humphreys, United States judge for the district of Tennessee, although he did not appear to answer the charges against him. While he had not resigned his office, he had effectually abandoned it by adhering to the Confederacy and had accepted a judicial office under that government.<sup>16</sup>

The point conceded by Dallas in the *Blount* case, was directly presented in the case of William W. Belknap, Secretary of War under President Grant. In 1876, Belknap, realizing that the House was going to impeach him, presented his resignation and Grant accepted it about two hours before the House voted the impeachment. He then entered a plea to the jurisdiction of the Senate to try him, on the ground that he was a private citizen at the time the charges were preferred against him. The Senate, after a long and able debate, decided by a vote of 37 to 29, 7 not voting,<sup>17</sup> that it had jurisdiction, and it proceeded with the trial. However, on the final vote, all except two of those who held that the Senate had no jurisdiction refused to consider the case on its merits and voted "not guilty," giving as their reason therefor the fact that, in their opinion, the Senate did not have jurisdiction.<sup>18</sup> The result was an acquittal, although a majority less than the necessary two-thirds held that the Senate had jurisdiction, and voted "guilty" on the evidence presented.

An important state case involving the same question as the Belknap case was judicially determined in Nebraska in 1893. In that state impeachments are presented by the two houses in joint session and the trials are had before the Supreme Court. In April, 1893, a joint session of the houses presented charges against John E. Hill, ex-state

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<sup>14</sup> 2 HINDS, PRECEDENTS, 678.

<sup>15</sup> See note, 7 *supra*.

<sup>16</sup> 3 HINDS, PRECEDENTS, ch. LXXIV, pp. 805-820.

<sup>17</sup> Belknap Trial, CONG. REC., 44 Cong. 1st Sess., Vol. 4, pt. 7, p. 76.

<sup>18</sup> Id. 343 *et seq.* The statement of Senator Cameron, of Wisconsin, may be given as typical of those voting for acquittal for the reason that they did not believe the Senate had jurisdiction. When called on to vote he arose and said: "Not guilty. I base my vote on the want of jurisdiction in the Senate to try the respondent, he not being a civil officer of the United States at the time he was impeached by the House of Representatives."

treasurer, and Thomas H. Benton, ex-state auditor, whose terms of office had expired in the preceding January. The Supreme Court, quoting Judge Story's views as given above, dismissed the cases on the ground that, under the constitution of Nebraska, which on this point is copied from the federal constitution, only persons actually in office when the proceedings are commenced are subject to impeachment.<sup>19</sup>

A number of cases have arisen in the states in which the resignation or expiration of the term came after the impeachment proceedings had been started and before final judgment. In some of these cases the proceedings have been dropped, apparently without any determination as to whether the Senate was deprived of jurisdiction to proceed.<sup>20</sup> Such cases are of no particular value as precedents. In one case, that involving the impeachment of Governor Warmoth, of Louisiana, in 1872, it was decided that the Senate's jurisdiction was terminated by the expiration of the term of office during the trial, Chief Justice Ludeling, who presided, saying in his opinion: "I question the policy of kicking a dead lion."<sup>21</sup> In other cases, however, the Senate has definitely determined that its jurisdiction was not divested by the resignation. For example, after William Seeger, State Treasurer of Minnesota, had been impeached by the House, he presented his resignation to the Governor, who accepted it; but the Senate by a vote of 26 to 10 refused to receive evidence of his resignation, and found him guilty and removed him from office.<sup>22</sup> Another case in point was that of Lieutenant Governor Alexander K. Davis, of Mississippi, charged with selling a pardon to a convicted murderer while the Governor was absent from the state. He attempted to resign, but the Senate proceeded with the case, found him guilty, removed and disqualified him.<sup>23</sup> And, finally, we have the recent case

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<sup>19</sup> Nebraska vs. Hill, 37 Neb., 80.

<sup>20</sup> The following cases are in point:

In 1796, the House of Representatives of North Carolina instituted impeachment proceedings against the secretary of state, for corruption in office. He then resigned and the proceedings were dropped.—D. Y. Thomas, "The Law of Impeachment in the United States," 2 AMER. POL. SC. REV. 390.

In the same state, in 1871, a few days after impeachment charges had been brought against Judge Edmund W. Jones, he resigned, but the Governor refused to accept the resignation until the impeachment charges should be disposed of. Thereupon the house withdrew them. TRIAL OF WILLIAM SULZER, Vol. 1, 336.

In 1876, the carpet-bag governor and the superintendent of education, in Mississippi, were allowed to resign after impeachment charges had been voted by the lower house of the legislature. Id. 333; FOSTER ON THE CONSTITUTION, 682.

<sup>21</sup> TRIAL OF WILLIAM SULZER, Vol. 1, 329; FOSTER ON THE CONSTITUTION, 689.

<sup>22</sup> TRIAL OF WILLIAM SULZER, Vol. 1, 331; FOSTER ON THE CONSTITUTION, 699.

<sup>23</sup> TRIAL OF WILLIAM SULZER, Vol. 1, 333; FOSTER ON THE CONSTITUTION, 683.



against Governor James E. Ferguson, of Texas. In that case, in 1917, after the Senate had found respondent guilty on a number of articles but before the final judgment had been determined upon, he filed his resignation with the Secretary of State. The Senate, holding that its jurisdiction was not affected, proceeded by a vote of 27 to 4 to pronounce its final judgment of removal and disqualification.<sup>24</sup> In 1924, the question of the Senate's jurisdiction came before the State Supreme Court and in an able opinion by Special Chief Justice Alexander Coke, the Court upheld the right of the Senate to conclude the trial by pronouncing judgment.<sup>25</sup>

From these cases it would seem to be fairly established in spite of the weight of Judge Story's contention, that the respondent can not, by his own act of resignation after the impeachment charges have been voted by the House, divest the Senate of jurisdiction to try the case and pronounce judgment against him. The *Warmoth* case in Louisiana suggests that the result may be different where the official relation is terminated by lapse of time rather than by the voluntary action of the respondent. The *Hill* case in Nebraska tends to establish the proposition that the day of impeachment is passed when the official relation is terminated, either by resignation or by lapse of time, before the impeachment charges are voted by the proper legislative body. In this particular, perhaps the *Belknap* case should be classed with the *Hill* case, for the reason that although the majority of the Senate held that Belknap's resignation did not prevent impeachment, the minority of more than one-third was able to block a trial of the case on its merits.

The present writer is not convinced of the soundness of the distinc-

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<sup>24</sup> IMPEACHMENT TRIAL OF GOV. JAS. E. FERGUSON, 853.

<sup>25</sup> 114 Tex. 85, 263 S. W. 888 (1924). At page 99, the Court said:

"On no admissible theory could this resignation impair the jurisdiction or power of the Court to render judgment. The subject matter was within its jurisdiction. It had jurisdiction of the person of the Governor—it had heard the evidence and declared him guilty. Its power to conclude the proceedings and enter judgment was not dependent upon the will of the Governor. Otherwise, a solemn trial before a high tribunal would be turned into a farce. If the Senate only had power to remove from office, it might be said, with some show of reason that it should not have proceeded further when the Governor by anticipation performed, as it were, its impending judgment. But under the Constitution the Senate may not only remove the offending official—it may disqualify him from holding further office, and with relation to this latter matter, his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh hour resignation."

tions that these cases seem to make or of Judge Story's contention that the respondent must be in office at the time the judgment is pronounced. We have seen that the fathers adopted the English system of impeachment with only two important changes, and that ex-officials like all other subjects were impeachable under that system. We have also seen that some of the early state constitutions made express provisions for impeaching ex-officers. The provisions of the federal Constitution do not in terms forbid such a practice, but merely prescribe that certain officers shall, upon conviction, be removed from office. The two clauses of the Constitution taken together may be regarded as fixing a minimum and a maximum penalty—for a person in office the minimum is removal, and in any case the maximum is removal plus disqualification. The offender by his conduct while in office has rendered himself liable to both penalties. It is for the House as the prosecutor to determine whether it will press for the full penalty of the law, and for the Senate as the trial court to determine, after a full hearing, whether the offense merits the extreme penalty of disqualification as well as removal. The respondent can not by any act of his own deprive the people of the full measure of the protection provided for them in the fundamental law. The true rule was aptly stated by Chief Justice Coke, in the case of *Ferguson v. Maddox*, previously referred to, when he said:

For their protection the people should have a right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh hour resignation.

#### FOR WHAT OFFENSES ARE OFFICERS IMPEACHABLE?

This question has arisen in practically every impeachment trial in the history of the country. The Constitution does not definitely answer it for it names two specific crimes, treason and bribery, and then adds the general words, "other high crimes and misdemeanors."<sup>28</sup> What offenses, it is asked, fall under the terms "high crimes and misdemeanors?" More specifically, do these words embrace penal offenses only or do they include non-indictable and political offenses also?

Whatever may have been the difficulty in answering these questions in the early days of this country, it is now very generally conceded that impeachment bodies are not confined to indictable offenses.

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<sup>28</sup> Art. II, Sec. 4.

The terms, "high crimes and misdemeanors," are terms of art brought over from the English system and have with us the meaning acquired there by long usage. During the seventeenth century, impeachment was one of the chief weapons used by the Commons in their struggles against the Crown. In the first three years of the Long Parliament, 1640-1642, twenty-seven of the ministers and favorites of Charles I were called to account by means of this powerful weapon.<sup>27</sup> In these and in many earlier and later cases, non-indictable and political offenses played quite as important a part as criminal offenses, and all were designated "high crimes and misdemeanors."<sup>28</sup> In this country, too, non-indictable offenses have played a part in almost all federal impeachments. Said a recent writer :

Judge Archbald was tried and convicted on five out of thirteen articles, not one of which charged an indictable offense. In the impeachments of Chase, Peck, Johnson, and Swayne a majority of the Senate, though not two-thirds thereof, declared the respondents guilty of offenses not indictable. And in the Pickering, Humphreys and Archbald cases more than two-thirds of the Senate convicted the respondents and punished them for offenses not indictable.<sup>29</sup>

What is true of federal impeachments is equally true of impeachment trials in the states. Many of them were based in whole or in part on offenses not punishable by law. For example, nearly half of the twenty-one charges brought against Governor Ferguson did not involve the violation of the penal statutes, and he was convicted on three of these charges, along with several involving penal offenses.<sup>30</sup>

<sup>27</sup> 1 STEPHEN, HISTORY OF THE CRIMINAL LAW, 159 note.

<sup>28</sup> ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS, 35-6. The greater part of this treatise was prepared as a brief while the writer was counsel for the respondent in the impeachment of Judge Robert W. Archbald, in 1912. It later appeared as two articles in the University of Pennsylvania Law Review, Vol. 64, pp. 651 and 803, and was later printed in book form with an extensive appendix containing the articles of impeachment in all English and federal cases down to this time. The writer proves conclusively that impeachment under our federal and state constitutions may be based on non-indictable offenses. See pages 30-60. See also on this point "The Impeachment of the Federal Judiciary" by Wrisley Brown, 26 HARV. L. REV. 684, 689-92.

<sup>29</sup> Simpson, Op. cit. 41-2. It will be remembered that the principal charge against President Andrew Johnson was the violation of the Tenure of Office Act by the removal of Edwin M. Stanton, Secretary of War, and the appointment of General Lorenzo Thomas as Secretary of War *ad interim*. This was not an offense of any sort, as is clearly shown by the recent decision of the Supreme Court in the case of Myers v. United States, decided Oct. 25, 1926, holding that Congress cannot restrict the President's power to remove officers appointed by him.

<sup>30</sup> Articles 16, 17 and 19, on which the senate voted guilty by more than a two-thirds vote, charged the Governor with an attempt to exercise undue influence with the Board of Regents to secure the dismissal of certain professors in the

Among the charges on which Governor John C. Walton, of Oklahoma, was convicted and removed in 1923, were such political offenses as abuse of the pardoning power, abuse of the power to declare martial law, and improper use of the militia to prevent the assembling of a self-convened session of the assembly.<sup>81</sup>

In view of the history of impeachments in England and in this country the Nebraska Supreme Court was fully justified in saying:

We are constrained to reject the views of Professor Dwight, Judge Curtis, and other advocates of the doctrine that an impeachable misdemeanor is necessarily an indictable offense, as too narrow and tending to defeat rather than promote the end for which impeachment as a remedy was designed and not in harmony with fundamental rules of constitutional construction. It may be safely asserted that when the act of official delinquency consists in violation of some provision of the Constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty wilfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was wilful and corrupt, it is within the definition of misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a wilful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state.<sup>82</sup>

Not only is it not necessary that the offense be indictable, it is now fairly settled that it need not be directly connected with the duties of

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University of Texas, with having sought to remove members of the board for refusing to vote as he wished, and with having attempted to influence the conduct of one member by remitting a forfeited bond on which the member was a surety—all acts contrary to the spirit of the constitution and statutes of the state, but none involving a penal offense.—IMPEACHMENT TRIAL OF GOV. JAS. E. FERGUSON, p. 864.

<sup>81</sup> See articles of impeachment numbered XIX, VI, VII, VIII, IX, X, XI. IMPEACHMENT PROCEEDINGS, pp. 19-55. The vote on article XIX, charging abuse of the pardoning power was guilty 41, not guilty 0, absent 1. *Id.* p. 1842.

<sup>82</sup> *State v. Hastings*, 37 Neb. 96, 114-116, 55 N. W. 774 (1893).

"A cause for a removal from office may exist when no offense against positive law has been committed, as where the individual has, from immorality, or imbecility, or mal-administration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar, and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer." 1 CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES, 481-2.

See also FOSTER ON THE CONSTITUTION, 581 *et seq.*; COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 3rd ed., 177-178; 1 TUCKER, CONSTITUTION OF THE UNITED STATES, 419; 1 STORY ON THE CONSTITUTION, 5th ed., secs. 796-800, pp. 580-5. CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, 980 *et seq.*

the office. Treason and bribery, which are named in the Constitution as impeachable offenses, are not the less impeachable merely because in a particular case they may have been committed otherwise than in the performance of official duties. So, too, it is clear that murder or robbery or incest, when committed by a public officer, though having no direct connection with his official duties, may render him so infamous as to destroy his usefulness as an officer and call for his removal by impeachment. And the particular official station held by the offender may render conduct not intrinsically wrong impeachable. A federal judge would be impeached for active participation in partisan politics, as tending to destroy public confidence in the impartiality of the courts,<sup>33</sup> but no one objects to political activity on the part of the President as the titular head of his party. It may safely be stated that any course of conduct that, according to the existing standards of morality and propriety, brings a public official into ignominy or disgrace, or that seriously shakes the confidence of the people in his administration of public affairs, is a "high crime or misdemeanor," which may properly call the impeachment machinery into play.<sup>34</sup>

#### IMPEACHMENT FOR ACTS DONE PRIOR TO TAKING OFFICE

It has been said that an offense is not impeachable unless committed during incumbency in office.<sup>35</sup> The correctness of this proposition may well be doubted. The case cited in its support is that of Judge Archbald, who was convicted by the Senate on several counts charging delinquencies that occurred after his appointment to the Commerce Court but who was acquitted on all the articles charging offenses alleged to have been committed by him while serving as federal district judge before his appointment to the Commerce Court. The writer admits, however, that "the considerations that brought about this result can only be surmised, but it is likely that it was due to a cautious disinclination on the part of the Senate to establish the precedent

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<sup>33</sup> It is of interest to note that political activity on the part of federal judges has not always been regarded as cause for removal. In the early days under the Constitution federal judges took part in political campaigns and indulged in bitter partisan harangues in their charges to grand juries. See 1 WARREN, SUPREME COURT IN UNITED STATES HISTORY, 275. This practice was the basis of the charge in article 8 in the impeachment of Judge Chase.—3 HINDS, PRECEDENTS, 724.

<sup>34</sup> For further discussion see "The Law of Impeachment in the United States," by David Y. Thomas, 2 AM. POL. SC. REV. 378; "The Impeachment of the Federal Judiciary," by Wrisley Brown, 26 HARV. L. REV. 684, 692; and SIMPSON, FEDERAL IMPEACHMENTS, 53.

<sup>35</sup> See Wrisley Brown, "Impeachment of the Federal Judiciary," 26 HARV. L. REV. 684, 692.

that a civil officer may be impeached for offenses committed in an office other than that which he holds at the time of his impeachment."<sup>36</sup> Since that was written, however, there has occurred the celebrated case of Governor William Sulzer, of New York, who, in 1913, was impeached and removed from office for an offense committed before he entered office, the principal charge against him being the filing of a false affidavit as to his campaign contributions and expenditures, made after election but before his induction into office. The vote on this charge was 39 guilty to 18 not guilty.<sup>37</sup> Attention is also called to the fact that prior to the Sulzer case, at least three cases had occurred in the states of impeachment and removal for offenses committed in a prior term of the same office, the cases of Judge Barnard in New York, Judge Hubbell in Wisconsin, and Governor Butler in Nebraska. In the case of *State v. Hill*, Judge Norval commented on these cases as follows:

There was good reason for overruling the plea to the jurisdiction in these cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.<sup>38</sup>

That this is the correct rule, seems obvious. While something might be said in support of a rule that the impeaching bodies should not substitute their own ideas of fitness for office for those of the electorate, such arguments fail where the delinquencies were not known, or were but imperfectly known, at the time of the appointment or election. Said the Supreme Court of Iowa:

The very object of removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving. Re-election does not condone the offense. Misconduct may not have been discovered prior to election, and, in any event, had not been established in the manner contemplated by the statute. This has been the uniform rule in impeachment

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<sup>36</sup> Id. 704. For statement of the views of Senator Borah and others, on this point, see 2 TRIAL OF ARCHBALD, 1634-6.

<sup>37</sup> 2 SULZER IMPEACHMENT, 1590, 1686.

<sup>38</sup> 37 Neb. 80, 88-9.

trials, where, coupled with removal from office, is the penalty of disqualification to hold any office of honor, trust, or profit under the state.<sup>39</sup>

#### IMPEACHMENT AT SPECIAL SESSIONS

In each of the three latest important state cases, those involving the impeachment of Governor Sulzer in New York, in 1913, of Governor Ferguson in Texas, in 1917, and of Governor Walton in Oklahoma, in 1923, the proceedings took place at a special session of the legislature called by the Governor to consider legislative matters, and not for purposes of investigation or impeachment. In each case strenuous objections were urged against the jurisdiction of the House to prefer, and of the Senate to try, impeachment charges at a special session. In New York, after a long and able debate,<sup>40</sup> the impeachment court, which in that state consists of the senators and the members of the Court of Appeals, decided by a vote of 51 to 1<sup>41</sup> that it had jurisdiction, thus sustaining the argument of counsel for the managers that the clause of the state constitution, providing that at a special session "no subject shall be acted upon, except such as the governor may recommend for consideration," referred to legislative matters only and not to the judicial function of impeachment, which, it was contended, is inherent and may be exercised by the houses whenever they are in session.<sup>42</sup> This action was upheld by the courts of New York,<sup>43</sup> and similar action by the courts of impeachment was sustained by the highest judicial tribunals in Texas<sup>44</sup> and in Oklahoma.<sup>45</sup> Hence it would

<sup>39</sup> *Iowa v. Welsh*, 109 Ia. 19, 21-22, 79 N. W. 370. In *Graham v. Jewell*, 263 S. W. 693 (1924) the Court of Appeals of Kentucky, at page 697 said:

"In impeachment or other proceedings for removal, where by statute a removal carries with it a disqualification to hold office in the future, a removal may be had for acts committed during a prior term of office."

<sup>40</sup> 1 SULZER IMPEACHMENT, 67-111, 132-165, 175-186, 186-205, 206-215.

<sup>41</sup> *Id.*, 225.

<sup>42</sup> See argument of Judge Alton B. Parker, 1 SULZER IMPEACHMENT, 175-186.

<sup>43</sup> *People ex rel Robin v. Hayes*, 143 N. Y. S. 325; aff. 163 App. Div. 725, 149 N. Y. S. 250; appeal dismissed, 212 N. Y. 603, 106 N. E. 1041.

<sup>44</sup> *Ferguson v. Maddox*, 114 Tex. 85, 263 S. W. 888 (1924). On page 94 of the official report, the Court said:

"The powers of the House and Senate in relation to impeachment exist at all times. They may exercise these powers during a regular session. No one would question this. Without doubt they may exercise them during a special session, unless the constitution itself forbids. It is insisted that such inhibition is contained in Article III, Section 40, which provides that legislation at a special session shall be confined to the subjects mentioned in the proclamation of the Governor convening it. This language is significant and plain. It purposely and wisely imposes no limitation, save as to legislation. As neither house acts in a legislative capacity in matters of impeachment, this section imposes no limitation with relation thereto, and the broad power conferred by

seem to be definitely established that impeachment proceedings may be begun and carried to completion at a special session whether called for the purpose or not.<sup>46</sup>

A related question is whether a legislative body, in the absence of express constitutional or statutory authority, can convene itself for purposes of impeachment. That it may do so was strongly urged by the late Alton B. Parker in his argument as counsel for the managers in the Sulzer impeachment;<sup>47</sup> and, in the case of *People ex rel Robin v. Hayes*, Justice Hasbrouck said:

The argument that the Assembly clothed with the power to impeach has no power to convene itself for such purpose has little to commend it, for it is at war with that interpretation of our federal and state constitutions which has made them equal to all the vicissitudes involved in a century and a third of national life.<sup>48</sup>

This opinion was extensively circulated in Texas and Oklahoma, and a call was issued for the assembling of the lower house of the legislature, in the one case by the speaker and in the other by a group of the members. In Texas, Governor Ferguson, seeing that a quorum was about to assemble in response to the speaker's call, himself issued a call for the same time and place. In Oklahoma, Governor Walton used the militia to disperse the assembled members, but later he called the special session that got out of hand and removed him. Thus, both governors obligingly removed the constitutional obstacles that a self-convened assembly would have found almost insurmountable.<sup>49</sup>

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Article XV stands without limit or qualification as to the time of its exercise."

<sup>46</sup> *State ex rel Trapp v. Chambers*, 220 Pac. 890.

<sup>47</sup> For a detailed discussion of the subject see M. T. Van Hecke, "Impeachment of Governor at Special Session," 3 Wis. L. Rev. 155.

<sup>48</sup> 1 SULZER IMPEACHMENT, 175-186.

<sup>49</sup> 143 N. Y. S. 328.

<sup>49</sup> Among the difficulties a self-convened assembly would encounter would be that of appropriating funds to pay the mileage and per diem of the members, the salaries of employees, and the travelling expenses of witnesses, and that of compelling the attendance and testimony of unwilling witnesses. All of these matters would probably have to be threshed out in the courts, causing interminable delay, which in turn, as a practical matter, would make it difficult or impossible to hold a quorum.

In Texas the legislature that impeached Governor Ferguson sought to regularize the process of assembling the house for impeachment purposes by providing that the house might be called for the purpose (a) by the governor, (b) by the speaker upon request of 50 members, or (c) by proclamation signed by a majority of the members. It was further provided that if impeachment charges were voted by such a called session, the senate, if not in session, could be assembled (a) by the governor, (b) by the lieutenant governor, (c) by the president pro-tempore of the senate, or (d) by proclamation of a majority of its members. GENERAL AND SPECIAL LAW OF TEXAS, 1917, 2nd and 3rd Called Sess. 102.

The machinery thus sought to be provided against corruption or oppression at



Another interesting question growing out of the Ferguson impeachment is whether the legislature has power to pardon the offense and restore the former governor's eligibility to hold office under the constitution of Texas. In 1925 the legislature passed and Governor Miriam A. Ferguson signed a bill attempting in general terms to release any person theretofore convicted on an impeachment from "all penalties or punishments inflicted or resulting from" such impeachment, "including any disqualification to hold any office of honor, trust, or profit under said state."<sup>50</sup> Before the bill was passed Attorney General Dan Moody rendered an opinion holding that such a law would be unconstitutional.<sup>51</sup> The correctness of this opinion will hardly be doubted when it is remembered that such a measure is an attempt on the part of the legislature to recall a judicial decision, or, viewed from another angle, is an attempt by it to exercise the pardoning power, which, by the Constitution, is conferred upon the governor in all criminal cases "except treason and impeachment."<sup>52</sup> While the power of the legislature to pass such an act was not before the court in the case of *Ferguson v. Maddox*, the language of the opinion would seem conclusive on this question:

The Senate sitting in an impeachment trial is just as truly a court as is this court. Its jurisdiction is very limited, but such as it has is of the highest. It is original, exclusive, and final. Within the scope of its constitutional authority, no one may gainsay its judgment.<sup>53</sup>

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the hands of the governor or others during the long recesses of the legislature, proved ineffective in December, 1925, when Speaker Lee Satterwhite proposed to call a special session to investigate the alleged abuses in the administration of Governor Miriam A. Ferguson; for the Attorney General held that there would be no funds available for paying members and employees or the expenses of witnesses. See Attorney General's opinion to Speaker Lee Satterwhite, dated December 21, 1925, (not yet printed), referring to an earlier letter to Rep. G. C. Purl, of Dallas.

An argument might be made to the effect that if the house had authority to assemble for impeachment purposes, it had authority to do everything necessary to carry that power into effect, such as appropriating funds for necessary expenses and compelling the attendance of unwilling witnesses.

"When a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other."—COOLEY, CONST. LIM. 6 ed. 78.

<sup>50</sup> Gen. Laws of Texas, 1925, ch. 184.

<sup>51</sup> HOUSE JOURNAL, Texas Legislature, Thirty-ninth Regular Session, 1925, pp. 672-681.

<sup>52</sup> Art. 4, Sec. 11.

<sup>53</sup> 114 Tex. 94. For a detailed study of the subject, see an article by M. T. Van Hecke, "Pardons in Impeachment Cases," 5 MICH. ST. BAR JOURNAL, (May, 1926) 657.

## IS IMPEACHMENT AN ADEQUATE REMEDY?

As we have now had something more than a century and a quarter of experience with the impeachment machinery devised by the Convention of 1787, it is possible to form some estimate of its effectiveness as a remedy. However, the limits of this paper will allow only an inadequate consideration of so large a topic.

In the beginning it should be noted that at the time when impeachment was incorporated into our system by the Revolutionary fathers, it was already moribund in the land of its birth. We picked up, so to speak, a cast-off garment of the British government, a political device which had proven of great value in the seventeenth century struggle between Crown and Parliament, but which at the very time we adopted it, was being used in England for the last time save one, in the famous trial of Warren Hastings. As a matter of history, there have been but three impeachment trials in England during the last two hundred years, and not one during the last one hundred and twenty years.<sup>54</sup> "It is hardly probable," said Sir James F. Stephen more than forty years ago, "that so cumbrous and unsatisfactory a mode of procedure will ever be resorted to again. The full establishment of popular government, and the close superintendence and immediate control exercised over all public officers whatever by parliament, make it not only unlikely that the sort of crimes for which men used to be impeached should be committed, but extremely difficult to commit them."<sup>55</sup>

Impeachment is one of the few remaining vestiges of legislative justice, which once had extensive vogue in England and in the early history of this country, and it is subject to all the objections urged against that form of administering the law.<sup>56</sup> Some of the most serious of these objections will be briefly stated here.

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<sup>54</sup> Though there were great criminal trials before the House of Lords as far back as 1283, impeachment in its modern form, with the House of Commons as the accuser and the House of Lords as the trial court, was evolved during the last quarter of the fourteenth century, from 1376 to 1400. It was much in vogue during the next half century, but fell into disuse during the period of the strong Tudor monarchy, there being no impeachment trials from that of Lord Stanley, in 1459, until that of Sir Giles Mompesson in 1621, a period of 162 years. This disuse is variously attributed to the activities of the Court of Star Chamber, to the frequent use made of bills of attainder, and to the fact that during this period the Parliament was unable to cope with the Crown and its ministers. With the rise of the middle classes in the sixteenth and seventeenth centuries, the Commons became strong enough under the Stuarts to challenge the power of the Crown, and impeachment was its chief weapon. As a result, between 1621 and 1724 there were more than fifty impeachments. Since 1724 there have been but three such trials, that of Lord Lovat in 1746 to 1747, that of Warren Hastings, 1788 to 1795, and that of Lord Melville in 1805 to 1806.—1 STEPHENS, HIST. CRIM. LAW, 145-160; 4 HATSELL'S PRECEDENTS, 56 *et seq.*

<sup>55</sup> 1 STEPHEN, HIST. CRIM. LAW, 160.

<sup>56</sup> See three articles on "Justice According to Law," by Dean Roscoe Pound, in 13 COL. L. REV. 696, and 14 *Id.* 1, 103.

1. As stated in the quotation from Sir James F. Stephen, given above, impeachment is an extremely cumbersome piece of machinery. And not less so in this country than in England. It could not be otherwise with a grand jury composed of the House of Representatives with its 435 members, and a trial court composed of the Senate with 96 members. Lord Bryce has pertinently said that

Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at. Or to vary the simile, impeachment is what physicians call a heroic medicine, an extreme remedy, proper to be applied against an official guilty of political crimes, but ill adapted for the punishment of small transgressions.<sup>57</sup>

Forty years ago, Woodrow Wilson, with equal facility of expression, leveled the same criticism at this governmental device:

The processes of impeachment, like those of amendment, are ponderous and difficult to handle. It requires something like passion to set them a-going; and nothing short of the grossest offenses against the plain law of the land will suffice to give them speed and effectiveness. Indignation so great as to overgrow party interest may secure a conviction; nothing less can. Indeed, judging by our past experience, impeachment may be said to be little more than an empty menace. The House of Representatives is a tardy grand jury, and the Senate an uncertain court.<sup>58</sup>

2. Like all ponderous machinery, impeachment moves very slowly. In the recent case against Judge English, for example, nearly two full years elapsed between the time when the charges made by a St. Louis newspaper were brought to the attention of the House by Representative Harry B. Hawes, of Missouri, and the time when the respondent was to have been called upon to plead before the Senate to the charges brought against him.<sup>59</sup> During most of the intervening months he continued

<sup>57</sup> BRYCE, *AMERICAN COMMONWEALTH*, 2 ed., 212.

<sup>58</sup> WILSON, *CONGRESSIONAL GOVERNMENT*, 275-6.

<sup>59</sup> The slow and tortuous process of impeachment proceedings may be gathered from the following chronology in the case against Judge English:

Dec. —, 1924, Rep. Hawes, of Missouri, called the attention of the House to the evidence collected by the St. Louis Post-Dispatch.

Jan. 28, 1925, Committee appointed to investigate.

Mar. 3, 1925, President approved House Joint Resolution 347, 68th Cong. 2nd Sess., directing a sub-committee of the Judiciary Committee composed of Wm. D. Boies, of Ia., Charles A. Christopherson, of S. D., Earl C. Michener, of Mich., Hatton W. Summers, of Tex., John N. Tillman, of Ark., and Royal H. Weller, of N. Y., to sit during the recess of Congress for investigation of charges.

Mar. 23 to Apr. 1, 1925, hearings held in St. Louis.

performing the duties of his high office. The tranquillity of the country was disturbed for a year and a half by the unsuccessful attempt and the subsequent impeachment of President Johnson,<sup>60</sup> and in the case of Judge Peck more than four years passed between the time when the charges were first brought to the attention of the House and the conclusion of the trial.<sup>61</sup> In the case of Warren Hastings, a little more than nine years elapsed from the day when Edmund Burke rose in the House of Commons and charged him with high crimes and misdemeanors in the government of India to the day when the House of Lords acquitted him, the trial itself lasting through eight sessions of Parliament, from February 7, 1788, to April 23, 1795.<sup>62</sup> Sir James F. Stephen said:

The impeachment of Warren Hastings is, I think, a blot on the judicial history of the country. It was monstrous that a man should be tortured, at irregular intervals, for seven years, in order that a singularly incompetent tribunal might be addressed before an excited audience by Burke and Sheridan, in language far removed from the calmness with which an advocate for the prosecution ought to address a criminal court. The acquittal of the defendant shows conclusively that if a guilty man did not escape, an innocent man was cruelly oppressed.<sup>63</sup>

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July 10, 1925, hearings held in Centralia, Ill.

Dec. 1, 1925, hearings held in Washington, D. C.

Dec. 19, 1925, Sub-Committee reported to the House, recommending impeachment. Report referred to Committee on Judiciary.

Jan. 12-13, 1926, Committee on Judiciary heard arguments by counsel for respondent.

Mar. 25, 1926, Committee on Judiciary reported to House, recommending impeachment.

Mar. 30-31-Apr. 1, 1926, Debate on Report by House. (CONG. RECORD 6401-6410, 6456-6472, 6521-6542, 6615-6640).

April —, 1926, Articles of impeachment presented to Senate and trial postponed to called session beginning Nov. 10, 1926.

<sup>60</sup> 3 HINDS, PRECEDENTS, chs. LXXV, LXXVI, pp. 821 *et seq.*

<sup>61</sup> Id. ch. LXXIII, pp. 772 *et seq.*

<sup>62</sup> TRIAL OF WARREN HASTINGS, table of contents.

<sup>63</sup> STEPHEN, HISTORY OF THE CRIMINAL LAW, 160.

Hastings, time after time, made piteous appeals to the Lords to speed up the trial. For example, in 1791, before the trial was half over and before the prosecution had finished the introduction of its testimony, he said:

"My Lords, it is not an acquittal that I desire; that will rest with your Lordships, and with your own internal convictions. I desire a defence, and I desire a judgment, be that judgment what it will. . . . I am not a man of apathy, nor are my powers of endurance equal to the tardy and indefinite operation of Parliamentary justice. I feel it a very cruel lot imposed upon me, to be tried by one generation, and, if I live so long, to expect judgment from another; for, my Lords, are all the Lords present before whom I originally was tried? Are not many gone to that place to which we must all go? I am told that there is a difference of more than 60 in the identity of the Judges before whom I now stand."—

TRIAL, Part IV, pp. 66-68.

At the conclusion of the trial, 87 peers who began the trial were either dead or

3. Necessarily a piece of machinery so ponderous and slow of motion is very expensive to operate—expensive in actual outlay and in the losses due to the interruption of the orderly business of government. The outlay in money for salaries of members of Congress, for clerk hire, for expenses of witnesses brought to Washington from distant parts of the country, for publishing the reports and proceedings, is no small item even for the national treasury to bear,<sup>64</sup> while attorney's fees and other essential outlays frequently leave the defendant penniless.<sup>65</sup>

4. Members of the high court of impeachment who have heard little of the testimony on which they must act constantly take part in deliberating and in voting on the final verdict of guilty or not guilty. In the impeachment of Judge E. St. J. Cox, in Minnesota, in 1881, the roll calls, by actual count, showed that an average of one-third of the senators were absent during the taking of testimony. Many senators were absent from half or two-thirds of the roll calls, and one senator who voted for conviction never once answered to his name on roll call during the introduction of the evidence.<sup>66</sup> In the Warren Hastings trial the usual attendance was not more than one-fourth of

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[Scotch peers] had retired from the House of Lords. Only 29 peers were present in their robes and voted on the question of his guilt, the vote standing 26 to 3, for acquittal.

<sup>64</sup> The actual outlay for a long-drawn federal impeachment is probably well above a million dollars, while the indirect losses to the country are frequently much more.

In the Ferguson impeachment, the legislature appropriated for the first called session of thirty days which was all consumed in the taking of testimony before the house, sums totalling \$190,000. For the second session of thirty days, which was consumed in presenting the same testimony to the senate, there were appropriated sums totalling \$135,000, making a grand total of \$325,000.—GEN. LAWS OF TEXAS, 1917, 2nd and 3rd Called Sess. pp. 1, 2, 49, 50, 85.

The impeachment of Governor Walton, in Oklahoma, was considerably more expeditious and probably cost little more than the \$150,000 appropriated at the beginning of the session. Some three months later a second appropriation of \$150,000 for expenses was made by the same special session, but this was probably largely used for other purposes.—SESS. LAWS, 1923-1924, pp. 1, 31.

In New York appropriations for the Sulzer trial totaled \$246,200.—LAWS OF N. Y. EXTRAORDINARY SESS., 1913, chs. 802, 835, 836, pp. 2261, 2479, 2480.

<sup>65</sup> Warren Hastings spent in his own defence not less than £100,000. Converted into American money of the present purchasing power, that sum would probably equal five million dollars. By way of reimbursement the Directors of the British East India Company and the Commissioners of the India Board of Control, paid his legal expenses and allowed him and his heirs an annuity of £4,000 for twenty-eight and a half years.—TRIAL OF WARREN HASTINGS, Part VIII, p. 330.

The Legislature of New York appropriated \$40,000 to pay Governor Sulzer's legal expenses during the trial.—LAWS OF N. Y. (EXTRA SESS.) (1913) ch. 836, p. 2480.

<sup>66</sup> Tabulations were made by the writer from the roll calls recorded in the proceedings, see IMPEACHMENT OF JUDGE E. ST. JULIEN COX.

the membership of the House of Lords.<sup>67</sup> The attendance was very little if any better during our most recent federal case, that of Judge Archbald, in 1912. Yet all the senators took part in rendering the verdict of guilty and in pronouncing the judgment of removal and disqualification.<sup>68</sup> Such conduct on the part of judges and juries in ordinary courts of justice would start a revolution.

5. Finally, impeachment courts are often subject to partisan prejudices and the personal and political influences so commonly brought to bear on ordinary legislative bodies. It is matter of common knowledge that the impeachments at the beginning of the nineteenth century, leveled against the state judges in Pennsylvania, Ohio, Tennessee and other states and against Judges Pickering and Chase of the federal bench, were prompted by the intensely bitter partisan feelings of that time.<sup>69</sup> That partisan bias is still an important factor in congressional investigations is shown by the proceedings of the committee that investigated charges brought against the late Judge Emory Speer, of Georgia.<sup>70</sup> In the impeachment of President Andrew Johnson party feeling was so bitter that an im-

<sup>67</sup> TRIAL OF WARREN HASTINGS, Pt. V, p. 26 note.

<sup>68</sup> Alexander Simpson, Jr., of counsel for Judge Archbald, at page 67 of his "Treatise," says:

"The thing that strikes a common law lawyer most is the few senators who in fact listen to the evidence. During the Archbald impeachment the membership of the Senate exceeded ninety, yet rarely over twenty members were present. Perhaps a hundred times the members present were privately counted with the result stated."

He explains how, when the point of no quorum was raised the bells would ring throughout the Senate end of the Capitol, the senators would come trooping in and the roll call would show a quorum. But in a few moments they would all be gone, "leaving the Senate as bare as it had been before."

<sup>69</sup> 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, ch. VI, pp. 269-315; 1 BEVERIDGE, LIFE OF JOHN MARSHALL; FOSTER ON THE CONSTITUTION, 661-664, 691-2; COOLEY, CONST. LIM., 194 note; "Impeachment and Trial of Judge N. W. Williams," by Douglas Anderson in 1924 TENN. BAR ASS'N. REPT., 218. (The proceedings are said to have been brought about as a result of a conspiracy and to have been "all politics," the judge having committed the "unpardonable sin" of refusing "to admit that Andrew Jackson was infallible.")

<sup>70</sup> Judge Speer was a Republican being investigated by a committee a majority of whom were Democrats. On the floor of the House, Congressman Volstead, of Minnesota, described the proceedings before the committee as follows:

"In this investigation, no effort was made to protect the judge against mere slander and abuse that could serve no other purpose than to disgrace and humiliate him. Every enemy that twenty-nine years on the bench had produced was invited and eagerly encouraged to detail his grievance, and to supplement that with all sorts of innuendoes, insinuations, and insulting opinions, utterly illegal as evidence and incompetent for any proper purpose. It is humiliating to have to admit that a Committee of Congress could consider such methods justifiable. No court in any civilized country would tolerate any such proceedings."—Quoted by Orville A. Park in an address on "Judge Emory Speer," before the Georgia Bar Association.—PROCEEDINGS, 1919, pp. 114-5.

partial trial was an utter impossibility. Time after time the highly impartial rulings of Chief Justice Chase were overruled by the rampant Republican majority.<sup>71</sup> Senators opposed to a conviction were subjected to all manner of political pressure and were threatened with political ostracism.<sup>72</sup> The final vote was partisan to a high degree, the majority, only one short of the necessary two-thirds, being drawn from the political faction opposed to the President, while "the minority included eight Democrats and four Republican supporters of the administration whose votes for an acquittal were in accordance with their political position. The scale was turned, however, by seven Republicans who had, hitherto, opposed the policy of the President; and who by this action sacrificed their hopes of a political future. For most of them disobeyed the instructions of their state legislatures or the leaders of the state organizations of their party; and in consequence lost all chance of a re-election."<sup>73</sup> In Nebraska, the impeachment of Governor Butler, in 1871, was so partisan, that the proceedings were subsequently expunged from the legislative record<sup>74</sup> and the Constitution was changed so as to vest the trial of impeachments in the Supreme Court instead of the Senate.<sup>75</sup>

The foregoing are some of the outstanding defects of impeachment as a remedy for administrative incompetence and corruption. The great expense, the slow and ponderous character of the machinery, and especially the partisan nature of the remedy, render it peculiarly objectionable as a means of dealing with the delinquencies of the judiciary. The importance of this is emphasized by the fact that im-

<sup>71</sup> FOSTER ON THE CONSTITUTION, 562.

<sup>72</sup> In 1922, Hon. William L. Frierson, former solicitor general of the United States, speaking before the Bar Association of Tennessee, described the closing scenes of the Johnson trial as follows:

"When the arguments were closed on May 6, the senate went into the consideration of the case behind closed doors and then followed one of the most discreditable chapters in American history. It soon became known that a few Republican senators were unwilling to vote for conviction. The senators were acting as judges sworn to try a criminal case of the gravest character. And yet, before any vote was taken, the attitude of practically every senator was generally known and a nationwide campaign was waged to influence the doubtful so as to secure a conviction. Petitions, resolutions, letters, threats and intimidation, if not direct efforts to bribe, were freely resorted to. It was made to appear that there was a well-nigh universal demand for a conviction and that a vote for acquittal would mean political suicide. There was little hope of influencing strong men like Fessenden, of Maine, and Trumbull, of Illinois, but the methods resorted to to control Ross, of Kansas, and some others, were nothing short of a most degrading and shameful persecution."—PROCEEDINGS, 1922, p. 125, 133.

<sup>73</sup> FOSTER ON THE CONSTITUTION, 564.

<sup>74</sup> LAWS OF NEBRASKA, 1877, p. 257.

<sup>75</sup> Constitution of 1875, Art. II, Sec. 14.

peachment in the federal government has largely been used as a means of calling judges to account. Of the nine federal impeachments, not including the recent case, one was of a senator who was held not to be subject to the remedy, one was of a president, and one of a cabinet officer. The other six were of judges, of whom three were convicted and three acquitted. In the states, also, the cases against judges probably outnumber all other cases combined.<sup>76</sup>

#### SUGGESTIONS AND CONCLUSIONS

In spite of the objections suggested above, impeachment has proven a very useful instrumentality in dealing with high state *executive* officers. Perhaps no one fully informed of the facts would for a moment question the salutary character of the result reached in the recent cases in Texas and Oklahoma. The same was undoubtedly true of the impeachments in the Southern states leveled at the plunderbund of the carpet-bag days. Political excitement and turmoil are unavoidable where a great political officer, like the governor of a state, is arraigned for offenses political as well as criminal. It must necessarily be so. For this reason it would seem to be undesirable to involve the Supreme Court in politics by placing upon it the burden of trying such cases, as has been done in the state of Nebraska, and we may well doubt if a satisfactory substitute for impeachment in such cases can be found. It would, therefore, seem to be wise to separate public officials impeachable under existing law into three classes as follows:

1. The president and his cabinet,<sup>77</sup> and in the states the governors and heads of departments. For these the remedy by impeachment should be reserved.
2. Lesser executive and administrative officers. These should be removed by the appointing agency, or by administrative boards after

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<sup>76</sup> FOSTER ON THE CONSTITUTION, 637 *et seq.* The writer here gives an incomplete list of impeachment trials in the states. More than half of those listed were judges and justices of the peace.

<sup>77</sup> In England the responsible cabinet system by which the entire cabinet or any delinquent member of it may be forced to resign at any time by an adverse vote of the House of Commons, has completely displaced the remedy by impeachment. With us something not altogether dissimilar seems to be slowly evolving as a result of the growth of what has been called "government by public opinion." Only one member of the president's cabinet has ever been impeached, but many have been forced to resign as a result of public opinion after political or other offenses had been exposed by a congressional investigation. For example three cabinet members were forced out in 1924 as a result of the senatorial investigations in connection with the naval oil reserve scandal and the mismanagement of the Department of Justice. In all such cases impeachment is the "gun behind the door," ready for use when needed.



notice and hearing, subject to judicial review on certiorari, or by judicial tribunals after trial, as is now done in many states.

3. Members of the judiciary, state and national. For this class, whatever the mode of presenting the charges may be, whether by impeachment by the legislature as at present, or by grand juries, or by organized bar associations; the trial should be by a judicial tribunal from which political, partisan, and personal influences are rigidly excluded. For cases involving federal district judges the circuit court of appeals of another circuit has been suggested as a proper tribunal, while for all other federal judges of inferior courts, the Supreme Court itself would be available.<sup>78</sup> For members of the Supreme Court, should another impeachment against them ever arise, a special tribunal of circuit judges might be used, following the example of Nebraska, where charges against supreme court judges are tried by the judges of the district courts.<sup>79</sup> In this way it is believed most of the evils now attendant upon impeachment trials where federal judges are involved can be avoided.

Whether provision for the judicial trial of charges against judges can be made without constitutional amendment is not certain. Probably so, in many of the states. If not, the process of constitutional change by revision and amendment is available and can readily be utilized to bring about the desired result. Under the federal Constitution, there is certainly no express restriction in the way. The tenure of federal judges is during good behavior. Nowhere is it stated what good behavior is, nor is it expressly stated how bad behavior shall be determined and dealt with. The judges, as "civil officers," are subject to impeachment, but that the Constitutional Convention of 1787, by making them so, intended thereby to exclude all other means of determining and punishing bad behavior on their part, may very well be doubted.

In recent years there has been a great expansion of the ordinary business coming before the federal courts while the Eighteenth Amendment and the Volstead Law have enormously swelled the volume and gone a long way toward converting the lower federal courts into police courts. The consequent multiplication of judges and of the functions that they must perform will multiply the complaints against them and render increasingly urgent the need for a simple, speedy, inexpensive, and nonpartisan method of trying them. It is high time we were finding a judicial substitute for this worn-out political device of seventeenth century England.

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<sup>78</sup> SIMPSON, *FEDERAL IMPEACHMENTS*, 74.

<sup>79</sup> Constitution of 1875, Art. 3, Sec. 14. *State v. Hill*, 37 Neb. 82.